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No. 99-1964

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In the Supreme Court of the United States

TIMOTHY BOOTH
Petitioner

v.

C.O. CHURNER, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 1997(e), as amended by the Prison Litigation Reform Act, requires a prisoner to exhaust administrative remedies before bringing a federal action, where the prisoner seeks only monetary damages in the lawsuit and the administrative scheme does not provide for an award of such damages?

PARTIES TO THE PROCEEDING

The petitioner is Timothy Booth. The respondents are Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain W. Gardner.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 206 F.3d 289 and is reprinted in the appendix to the *petition at* 1a.[1] *The opinion of the District Court is not* reported but is reprinted at Pet. App. 36a.

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1994 ed., Supp. IV). The judgment of the Court of Appeals was entered on March 7, 2000, and the petition for certiorari was filed within ninety days thereafter, on June 5, 2000.

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1997e(a) (1994 ed., Supp. IV) provides that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

The full text of Section 1997e is reprinted in the appendix to this brief at 1a.

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[1]The appendix to the petition is cited as "Pet. App. __a." The Joint Appendix is cited as "J.A. __."

STATEMENT OF THE CASE

1. This is a civil rights action by a state prisoner against four Pennsylvania prison officials. The petitioner is Timothy Booth, who at the time of the events of which he complains was imprisoned at the State Correctional Institution at Smithfield (SCI-Smithfield), in Huntingdon County, Pennsylvania. The four respondents — Corrections Officer Churner, Sergeant Workensher, Lieutenant Rikus, and Captain Gardner — were all employed at the same prison. J.A. 8 (complaint). Booth complains about four incidents, which he alleges took place from April of 1996 through March of 1997. All of these incidents occurred while petitioner was housed in a segregated housing unit at SCI-Smithfield, apparently for disciplinary reasons. J.A. 17 (affidavit for show of cause for emergency preliminary injunction); J.A. 12 (initial response to grievance).

First, petitioner claims that on April 27, 1996, he was assaulted by two prison officials, neither of whom he named as a defendant in this action. As a result, his shoulder "slips in and out"; he was told that he would receive an operation on his shoulder, but has not received one. J.A. 15 (complaint); J.A. 17 (affidavit for show of cause for emergency preliminary injunction) . There are no allegations which refer to any of the respondents in connection with this incident. Second, petitioner claims that on February 6, 1997, he threw water on one of the officers who had assaulted him the preceding April. That officer handcuffed him, removed him from his cell, took him to a storage room and threw a cup of cleaning material in his face. Again, there are no allegations which

refer to any of the respondents.[2] J.A. 15 (complaint). Third, petitioner claims that the next day, February 7, he exchanged words with respondent Rikus, who shoved him into a shelf. Another officer — not named as a defendant — tightened and twisted his handcuffs and left him handcuffed for half an hour, which aggravated his shoulder injury. J.A. 15-16 (complaint). Fourth, he claims that on March 23, 1997, respondent Churner punched him in the mouth while he was being strip searched, in the presence of respondent Workensher and others. Petitioner was then placed in a choke hold and forced to the floor, where Workensher handcuffed him. After this incident, petitioner was seen by a doctor and received three stitches in his mouth. J.A. 16 (complaint), 28-29 (amendment to specific relief).[3]

The Pennsylvania Department of Corrections maintains a three-tiered Inmate Grievance System "to ensure that inmates have an avenue through which

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[2]While this February 6 incident is included in his complaint, petitioner's later filings consistently omit it, claiming instead that he was "assaulted 3 time[s]," J.A. 21, and referring to assaults which allegedly occurred on April 27, 1996, February 7, 1997 and March 23, 1997. J.A. 17 (affidavit for show of cause for preliminary injunction); J.A. 21, 23 (affidavit in support of motion to proceed in forma pauperis); J.A. 26-27 (petition to show cause for appointment of counsel, etc.).

[3]The complaint contains no allegations which refer to respondent Gardner. Pet. App. 37a.

resolution of specific problems can be sought."[4] J.A. 40; *see* Pet. App. 6a-7a n.2. *See* Commonwealth of Pennsylvania, Department of Corrections, Consolidated Inmate Grievance Review System, Policy No. DC-ADM 804 (October 20, 1994), *reprinted with amendments at* J.A. 40-61. Grievances are submitted, on a form supplied by the institution, to the Facility Grievance Coordinator within fifteen days after the events upon which the claims are based; extensions of this time may be granted for good cause. J.A. 45-46. The Grievance Coordinator forwards the grievance to an appropriate Grievance Officer, a management-level employee whose identity varies depending on the specific nature of the grievance. J.A. 41-42, 46. The Grievance Officer's investigation may include interviews of the grievant and others having personal knowledge of the matter; a grievant who has requested a personal interview "shall be interviewed." J.A. 46-47. The grievant then receives a written response, ordinarily within ten working days. J.A. 47. The grievant may appeal this initial decision, within five days, to the Facility Manager, who must in turn notify the grievant of his or her

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[4]The Inmate Grievance System is not the only review mechanism maintained by the Department of Corrections. The imposition of disciplinary sanctions and confinement in administrative custody, for example, are governed by separate procedures for administrative review and appeal. *See, e.g., Shoats v. Horn*, 213 F.3d 140, 145 (3d Cir. 2000) (describing procedures for review and appeal of administrative custody decisions). Issues governed by such procedures fall outside the scope of the Inmate Grievance System, J.A. 50; the Department's policy is that for every issue "there shall be a forum for review and an avenue for appeal, but only one." J.A. 43.

decision within ten working days. J.A. 47-48. The grievant, within seven days, may then take a final appeal to the Department's Central Office Review Committee (CORC). The CORC may require further investigation, and issues its decision within twenty-one days.[5] J.A. 42, 48-49.

An amendment to the grievance policy adopted on May 1, 1998 permits a grievant to "include a request for compensation or other legal relief normally available from a court." J.A. 60. When petitioner filed this action, however, the grievance system did not provide for monetary payments. Then as now, however, neither the prescribed grievance form, nor the governing procedures, *requires* the grievant to specify any particular relief being sought.

Petitioner concedes that he did not exhaust this grievance procedure with regard to any of the four assaults he alleges, or with regard to obtaining an operation for his shoulder. *See* Br. for Petitioner at 6 & n.4; Pet. App. 20a. As to the first and last of the alleged assaults, and the shoulder operation, there is no indication that he filed a grievance at all. As to the alleged assaults of February 6 and 7, 1997, petitioner may or may

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[5]The text describes the procedure as it existed when petitioner filed this action, and some aspects of the procedure have since changed: grievances related to medical care, which formerly followed a separate appeal procedure, are now handled in the same way as other grievances, J.A. 54-55; and final appeals are now to the Department's Chief Hearing Examiner, rather than to the CORC. J.A. 56-57.

not have filed grievances about one or both of them,[6] but if he did, he did not pursue them beyond the initial step in the process; nor is there any indication that he requested any monetary payment.

2. Petitioner filed this action in the District Court pursuant to 42 U.S.C. § 1983, using a form provided by the courts. In the space on the form marked "RELIEF," he filled in "[f]irst protective order for transfer to another prison please my safety and life is at stake order preliminary injunction." J.A. 9. In a lengthy handwritten

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[6]The record is not clear on this point. On February 19, 1997, petitioner filed a grievance saying that he had requested to see a Captain Glenny about an "assault," and "asking to be heard for this wrong," but the grievance contains no further details. J.A. 13-14 (grievance). On March 5, 1997, the Grievance Coordinator denied a grievance which petitioner filed on the same day, in which he requested protective custody, on the ground that petitioner was "already in disciplinary custody which is a very secure housing." J.A. 12 (initial response to grievance). This grievance in turn was apparently a duplicate of one filed on February 14, 1997, *ibid*, but neither of these grievances is in the record. On March 13, 1997, the Grievance Coordinator denied a grievance which petitioner filed on March 12, and which apparently made some allegation of "abuse by officers," but this grievance likewise is not in the record. J.A. 10 (initial response to grievance). Finally, petitioner filed grievances on June 21 and 23, 1997 — after the District Court had dismissed his complaint — in which he refers to three of the four assaults alleged in his complaint, as well as to other matters, and requests "protection." J.A. 36-39 (grievances). Nothing in the record suggests that, in any of these grievances, petitioner requested monetary compensation.

attachment to the complaint form, he referred to "[n]o physical brutality by prison staff"; "[d]ecent [c]onditions in [p]rison"; [t]he [r]ight to decent medical care"; "[i]njunction"; "[a]ffirmative [o]rders ... [d]amages money"; "[c]ompensatory damages (pain and suffering) [n]ominal damages (mental anguish)"; and "[d]amages from the government." J.A. 11. Later in the handwritten attachment, he asked for "each and every officer to be punished for assaulting me." J.A. 16.

Petitioner followed up his complaint with several other filings, variously styled,[7] which repeated and expanded upon his allegations and requests for relief. *E.g.*, J.A. 26 (requesting appointment of counsel, a transfer out of SCI-Smithfield, an injunction "so that the prisoner will not be beaten again," and $400,000 in damages). Many of these filings likewise summarize the relief petitioner was seeking in other lawsuits,[8] including an

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[7]*See* J.A. 17 (affidavit for show of cause for emergency preliminary injunction and protective order); 21 (affidavit in support of motion to proceed in forma pauperis and for appointment of counsel and preliminary injunction for protection); 24 (petition for affirmative order "records" also relief plaintiff seeks); 26 (petition to show cause for appointment of counsel, to keep top officials as defendants; amending relief plaintiff seeks); 28 (amendment to specific relief). The Court of Appeals construed at least some of these later filings as amendments to petitioner's complaint. Pet. App. 21a-22a n.10.

[8]According to the District Court's docket, petitioner has filed thirteen lawsuits in the Middle District of Pennsylvania. (continued...)

operation on his shoulder, orders regarding the prison law library, and various amounts in damages. *E.g.*, J.A. 21, 24-25, 26-27. It is not clear whether petitioner intended to incorporate these requests for relief into this lawsuit.[9]

The District Court, citing 42 U.S.C. § 1997e(a), dismissed petitioner's complaint without prejudice for failing to exhaust the administrative remedy made available by the Inmate Grievance System. Pet. App. 36a-39a.

3. Petitioner, electing to stand on his complaint without amendment, Pet. App. 7a-8a n.3, appealed. He conceded that he had not exhausted the remedies of the Inmate Grievance System, Pet. App. 20a; but argued that, because the Inmate Grievance System could not provide

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[8](...continued)
See U.S. District Court PACER, http://pacer.pamd.uscourts.gov. Petitioner's filings in this case refer, by docket number, to the following cases: *Booth v. Smithfield Department of Correction*, No. 97-cv-00629 (filed April 22, 1997); *Booth v. Rikus*, No. 97-cv-00630 (filed April 22, 1997); and *Booth v. Smithfield State Prison*, No. 97-cv-00710 (filed May 2, 1997). *See, e.g.*, J.A. 24-25. In addition, petitioner refers to an action pending in the Court of Common Pleas of Huntingdon County, Pennsylvania at No. 97-499. *See* J.A. 21.

[9]In this Court, petitioner takes the position that "none of these [requests] were actually part of his complaint or claims for relief." Reply in Support of Pet. at 3. The Court of Appeals, however, perhaps misled by the difficulty of deciphering petitioner's lengthy handwritten filings, believed that they were. *See* Pet. App. 5a, *quoting* J.A. 26-27.

him with the money damages he sought, no administrative remedy was "available" within the meaning of Section 1997e(a).[10] Pet. App. 21a. The Court of Appeals, relying on its recent decision in *Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000), rejected this argument. Pet. App. 22a-23a.

In *Nyhuis*, the Court of Appeals had held that Section 1997e(a), as amended by the Prison Litigation Reform Act (PLRA),[11] "make[s] exhaustion of all administrative remedies necessary — whether or not they provide the inmate-plaintiff with the relief he says he desires in his federal action." 204 F.3d at 67, *quoted at* Pet. App. 22a. The Court of Appeals had looked in *Nyhuis* to the plain meaning of the statutory language, particularly in light of the changes wrought by the PLRA; to Congress' intent in the PLRA to reduce both the burden of prisoner lawsuits and judicial oversight of the management of prisons; and to the purposes of exhaustion generally. In light of these, the Court of Appeals had concluded in *Nyhuis* that Congress

> "intended to require prisoners to utilize the existing administrative remedies, whether

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[10]Petitioner also argued that his action was not one "with respect to prison conditions" within the meaning of Section 1997e(a). The majority of the Court of Appeals panel rejected this argument, Pet. App. 8a-19a, *cf.* Pet. App. 24a-28a (Noonan, J., concurring and dissenting), and petitioner did not pursue it in this Court. Pet. 6 n.3.

[11]Pub.L. 104-134, tit. VIII, 110 Stat. 1321, 1321-66 to 1321-77 (1996).

> the grievance procedure will produce the precise remedy that the prisoner seeks or some other remedy."

204 F.3d at 73, *quoting Moore v. Smith*, 18 F.Supp.2d 1360, 1364 (N.D.Ga. 1998). *Nyhuis* was a *Bivens* action against federal officials, but the Court of Appeals held that its rationale applied equally — indeed, with even greater force — to Section 1983 actions against state officials. Pet. App. 22a-23a. Accordingly, the Court of Appeals affirmed the order of the District Court.

On February 4, 1998, while petitioner's appeal was pending in the Court of Appeals, petitioner was transferred from SCI-Smithfield to the State Correctional Institution at Pittsburgh, Pennsylvania. *See* Br. for Petitioner at 4 n.3.

SUMMARY OF ARGUMENT

1. Section 1997e(a) of Title 42 provides that "[n]o action shall be brought by a prisoner ... until such administrative remedies as are available are exhausted." On its face, this provision requires that a prisoner exhaust any administrative remedy which can address his or her complaint, whether or not that remedy offers the precise relief the prisoner seeks in a lawsuit. Petitioner was thus required to exhaust the administrative remedies available at his prison, even though those remedies would not award him the monetary damages he sought in his lawsuit.

Congress enacted Section 1997e(a) in 1980, in an attempt to deal with the burdens placed on the federal

court system by prisoner civil rights suits, which even then had reached explosive proportions. In its original form, it provided only that courts could stay prisoner suits to allow the exhaustion of administrative remedies, but only if the court determined, or the Attorney General certified, that those remedies, among other things, were "effective"; even then, the stay was discretionary with the court. Comments of the Court and the Attorney General strongly suggested that, where a prisoner sought only money damages, an administrative remedy would be "effective" under Section 1997e(a) only if it provided them.

Section 1997e(a), however, itself proved ineffective in dealing with prisoner lawsuits, whose numbers continued to rise dramatically. Congress responded in 1996 with the Prison Litigation Reform Act (PLRA), which was designed both to reduce the burden of prisoner lawsuits, and to reduce judicial oversight of the management of prisons. Among other things, the PLRA rewrote Section 1997e(a), eliminating the requirement that administrative remedies be "effective," eliminating judicial oversight of the sufficiency of prison remedies, and eliminating judicial discretion in whether to require exhaustion. A prisoner must now exhaust all "available" remedies before bringing an action, whether or not those remedies would have been considered "effective" under the previous version of the statute.

Petitioner's reading of the statute relies on words and phrases taken out of context, and taken particularly out of their historical context in light of the PLRA amendments. His reading would resurrect the idea that courts should evaluate prison administrative remedies for

"effectiveness," thus depriving the PLRA amendments of any real effect.

2. The broad exhaustion rule adopted by Congress best comports with the purposes of the PLRA. It promotes the resolution of disputes outside of litigation. It helps narrow, clarify and focus those issues that do go to litigation, thus lessening the burden on courts of sifting through prisoners' pro se complaints. It provides notice to prisons of problems and complaints; and provides a bright-line rule, easily understood by prisoners, prisons and courts alike. In all these ways, it reduces the burden of prisoner litigation on courts and other participants in the judicial system; and this is so even where the administrative remedy cannot provide a prisoner with monetary relief. Exhaustion is thus not a "futile" exercise merely because it cannot produce the relief which a prisoner might seek in a lawsuit.

In addition, the broad rule of requiring exhaustion in all cases eliminates any need for courts to evaluate the sufficiency of prison remedies on a case-by-case basis. This again reduces the burden of prisoner suits on the courts, while simultaneously reducing intrusive judicial oversight of prisons.

Petitioner's reading, on the other hand, would thwart these goals. It would allow prisoners to evade the exhaustion requirement at will, simply by tailoring the relief they sought; and it would bog down the courts — and the prisons — in satellite litigation over the sufficiency of prison administrative processes.

3. There is no general "futility" principle, under which the failure to exhaust is excused whenever the prescribed administrative remedy cannot provide the relief sought. The authority to prescribe the procedures under which claims may be heard in the federal courts belongs to Congress; and where Congress explicitly requires that administrative remedies be exhausted, exhaustion may not be dispensed with even where a court might conclude that the administrative process is "futile." In this case, the language, history, structure and purposes of Section 1997e(a) all show that Congress intended to impose a broad exhaustion requirement on prisoners before they were permitted to file federal lawsuits. The courts are not free to rewrite the statutory text to create an exception which Congress did not.

ARGUMENT

The issue in this case is whether, under 42 U.S.C. § 1997e(a), a prisoner who seeks monetary damages in a civil rights suit must first exhaust the administrative remedies at his prison, even where those remedies do not make provision for monetary payments. We submit that Section 1997e(a) embodies a broad rule which does require exhaustion in these circumstances. We address this issue first in light of the language of Section 1997e(a), particularly in the context of its amendment by the PLRA; then in light of the purposes Congress sought to advance by this statute; and finally in light of the "general principles of administrative law" which petitioner invokes.

I. The Language of Section 1997e(a) Requires A Prisoner to Exhaust Any Administrative Procedure Capable of Addressing the Subject of the Prisoner's Complaint, Whether or Not That Procedure Can Provide the Precise Relief the Prisoner Wants.

A. Before its amendment by the PLRA, Section 1997e required exhaustion only of those administrative remedies determined to be "effective," and even then only in the discretion of a court.

Section 1997e was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act, Pub.L. 96-247, 94 Stat. 352 (1980), and imposed a limited exhaustion requirement on actions brought by state or local prisoners under Section 1983. *See* 42 U.S.C. § 1997e (1994 ed.).[12] Section 1997e(a) allowed a court to continue such an action for 90 days[13] "to require exhaustion of such plain, speedy and effective administrative remedies as are available," *id.*, § 1997e(a)(1), if either the Attorney General or the court determined that the administrative remedies complied with "minimum acceptable standards" promulgated by the Attorney General, or were otherwise "fair and effective." *Id.*, § 1997e(a)(2); *see id.*, § 1997e(b) (minimum standards for systems for grievance

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[12]The full text of Section 1997e, as it read before it was amended by the PLRA, is reprinted in the appendix to this brief at 5a.

[13]Later enlarged to 180 days. *See* Pub.L. 103-322, tit. II, § 20416(a)(2), 108 Stat. 1833 (1994).

resolution); § 1997e(c) (procedure for review and certification of systems for grievance resolution). Even if a prison's administrative procedures complied with these "minimum acceptable standards," exhaustion was required only if the court "believe[d]" that [it] would be appropriate and in the interests of justice." *Id.*, § 1997e(a)(1). Thus, a court retained "ample discretion to determine that exhaustion nonetheless should be foregone." *McCarthy v. Madigan*, 503 U.S. 140, 150 (1992).

The Department of Justice, charged with certifying the adequacy of administrative procedures, strongly encouraged state and local authorities to make provision for money damages. The Department's regulations provided that "[t]he grievance procedure shall afford a successful grievant a meaningful remedy. Although available remedies may vary among institutions, a reasonable range of meaningful remedies in each institution is necessary." 28 C.F.R. § 40.6 (2000). While the Department stopped short of an outright requirement that grievance procedures make available monetary relief,[14] it did observe that "the relief available under the procedure must approximate the remedies available under [section 1983],"[15] — which of course include money damages —

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[14]"[A]lthough monetary relief is desirable, it is not an essential component of a fair and effective grievance procedure." 46 Fed. Reg. 3845 (1981).

[15]"If exhaustion is to be a realistic alternative ..., the relief available under the procedure must approximate the remedies available under [section 1983]. ... [G]rievance procedures must be empowered to award a broad range of

(continued...)

and stated its view that exhaustion often would not be "appropriate" within the meaning of Section 1997e if monetary relief were not available.[16]

The Court too commented on Section 1997e's requirement of "effective administrative remedies." *McCarthy v. Madigan, supra*, was an action, for money damages only, brought by a federal prisoner under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); and the Court held that, since the Bureau of Prisons grievance procedure did not provide for awards of money damages, the prisoner was not required to exhaust his administrative remedies. In reaching this conclusion, the Court first observed that "Congress has not meaningfully addressed the appropriateness of requiring exhaustion in this context," since Section 1997e (at that time) applied only to actions brought by state prisoners under Section 1983. 503 U.S. at 149. Nevertheless, the Court looked to Section 1997e for guidance, 503 U.S. at 149-51, and observed:

> [I]n contrast to the absence of any provision for the award of money damages under the Bureau's general grievance procedure, [Section 1997e] conditions exhaustion on the existence of "effective administrative

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[15](...continued)
remedies." 45 Fed. Reg. 79099 (1980).

[16]"Presumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, exhaustion would not be appropriate." 46 Fed. Reg. 3845 (1981).

> remedies." It is difficult to see why a stricter rule of exhaustion than Congress itself has required in the state prison context should apply in the federal prison context.

503 U.S. at 150-51, *quoting* 42 U.S.C. § 1997e(a)(1) (1994 ed.). The Court thus strongly suggested, albeit in dicta, that Section 1997e's requirement of "effective administrative remedies" implied provision for money damages, at least where money damages was the only relief a prisoner sought.

Congress enacted Section 1997e in an effort to deal with the burdens imposed by the explosive growth in prisoner civil rights actions, which increased from 2,030 in 1978, to 11,195 in 1979. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1985 Report of the Director, A-7 (Table C2). Congress anticipated that Section 1997e "will make an important contribution toward reducing court backlog in many districts. ... Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issues in the remaining cases so as to make them ready for expeditious court consideration." S. Rep. No. 415, 96th Cong., 2d Sess. 34 (1980). *See Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 509 (1982) ("Congress decided to adopt the limited exhaustion requirement of § 1997e in order to relieve the burden on the federal courts by diverting certain prisoner petitions back through state and local institutions," collecting legislative history)

Section 1997e's "extraordinarily detailed exhaustion scheme," *Patsy*, 457 U.S. at 509-10, however,

had little effect. State and local governments viewed its certification requirement as too burdensome and intrusive, and its limited exhaustion provision as too insubstantial, to make their participation worthwhile. *See* Lay, *Exhaustion of Grievance Procedures for State Prisoners under Section 1983 of the Civil Rights Act*, 71 Iowa L. Rev. 935, 937, 949-50 (1986); 46 Fed. Reg. 48186 (1981) (summarizing comments on Department of Justice's proposed rules). As a result, only a handful of prison authorities sought and obtained certification of their grievance systems from the Department of Justice. Lay, *supra*, 71 Iowa L. Rev. at 941-42. In the meantime, prisoner lawsuits continued to rise, from 19,448 in 1985 to 41,679 in 1995. Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1985 Report of the Director A-7 (Table C2); Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1999 Report of the Director 140 (Table C2A).

B. In the PLRA, Congress amended Section 1997e to remove the requirement that administrative remedies be "effective," to remove judicial oversight of the adequacy of administrative remedies, and to eliminate judicial discretion in requiring exhaustion.

Congress responded to this situation in 1996 with the Prison Litigation Reform Act (PLRA), Pub.L. 104-134, 110 Stat. 1321, which among other things substantially amended Section 1997e. The PLRA added to Section 1997e provisions allowing courts to screen prisoner complaints for frivolous or meritless actions, § 1997e(c);

limiting attorneys fees to successful prisoner litigants, § 1997e(d); barring suits by prisoners for emotional or mental injury without a prior showing of physical injury, § 1997e(e); encouraging hearings to be held in prisons or by telecommunication, § 1997e(f); and permitting defendants to waive replying to actions by prisoners, § 1997e(g).[17]

Most relevant to this case, the PLRA substantially rewrote Section 1997e's provisions on the exhaustion of administrative remedies. It deleted the requirement that administrative remedies be "plain, speedy and effective"; deleted the requirement for a determination by the Attorney General or a court that the administrative remedies complied with "minimum acceptable standards" or were otherwise "fair and effective";

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[17]Elsewhere, the PLRA also added provisions limiting the power of federal courts to issue injunctions regarding prison conditions; requiring all prisoners to pay filing fees; denying in forma pauperis status to prisoners who have had three or more dismissals of frivolous or meritless filings; providing for the collection of costs from prisoners; allowing district courts to screen prisoner complaints before docketing; and permitting the revocation of earned good time credits for federal prisoners who file malicious or knowingly false claims. *See* 18 U.S.C. § 3626 (1994 ed., Supp. IV); 28 U.S.C. §§ 1915, 1915A, 1932 (1994 ed., Supp. IV). The PLRA also provides that any damages awarded to a prisoner be paid directly to satisfy any outstanding restitution orders, and that the prisoner's crime victims be notified of any such award before it is paid to the prisoner. Pub.L. 104-134, §§ 807, 808, 110 Stat. 1321, 1321-75 and 1321-76, *reprinted at* 18 U.S.C. § 3626 note (1994 ed., Supp. IV).

eliminated the courts' discretion to require exhaustion only where a court believed it to be "appropriate and in the interests of justice"; changed the former 180-day continuance to a flat prohibition on bringing an action; and expanded the exhaustion requirement to apply to federal as well as state prisoners. As thus re-written, the exhaustion requirement now provides simply that "[n]o action shall be brought ... by a prisoner ... until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (1994 ed. Supp. IV).

We submit that, considered in its historical context, the meaning of this language is clear. Under the pre-PLRA statute, an "effective" remedy, at least in the context of a claim such as petitioner's, was one that provided for money damages. But by eliminating any requirement that a prison administrative remedy be "effective," Congress plainly meant to require prisoners to exhaust "such administrative remedies as are available," whether or not those remedies would have been considered "effective" under the pre-PLRA statute. Congress' further action in eliminating judicial oversight of the sufficiency of administrative remedies, and in making exhaustion mandatory rather than discretionary, only strengthens the conclusion that "Congress no longer wanted the courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is 'available' in the prison involved." *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998). Thus, in our view, a prisoner has an "administrative remed[y] ,,, available" if there exists an administrative procedure which can address the subject matter of his complaint, "'whether [it] will produce the precise remedy that the prisoner seeks or some other remedy.'" *Nyhuis v.*

Reno, 204 F.3d at 73, *quoting Moore v. Smith*, 18 F.Supp.2d 1360, 1364 (N.D.Ga. 1998).

C. Petitioner's narrow reading of Section 1997e's exhaustion requirement would deprive the PLRA amendments of "real and substantial effect."

Petitioner, however, argues that the "plain language" of Section 1997e(a) requires prisoners to pursue "only those administrative remedies that are capable of providing them the relief they seek." Br. for Petitioner at 15. Petitioner's argument relies heavily on dictionary definitions of isolated words, *see* Br. for Petitioner at 16, but even on its own terms, this argument is unconvincing. A remedy does not cease to be "capable of use," "accessible," "obtainable," or "ready for immediate use," just because it is not the remedy a prisoner desires.[18] In our view, the most natural reading of the phrase "such administrative remedies as are available" is that prisoners must exhaust whatever remedies their prison offers, whether or not this produces the relief they prefer.

Petitioner likewise focuses on the phrase "administrative ... procedure," which appears in subsection (b) of Section 1997e. This provides that "[t]he failure of a State to adopt or adhere to an *administrative grievance procedure* shall not constitute the basis for an

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[18]*See* Br. for Petitioner at 16, *quoting Webster's Third New International Dictionary* 150 (1993) and *Black's Law Dictionary* 135 (6th ed. 1990).

action" by the Attorney General under the Civil Rights of Institutionalized Persons Act. 42 U.S.C. § 1997e(b) (emphasis added); *see* 42 U.S.C. §§ 1997a, 1997c (1994 ed., Supp. IV). As petitioner sees it, the term "administrative procedure" stands in contrast to the term "administrative remedies" used in subsection (a), and illustrates that Congress intended to require exhaustion only of the prisoner's desired "remedy," and not merely of whatever "procedure" is available. *See* Br. for Petitioner at 21-22. In fact, however, it illustrates just the opposite.

Before the amendments enacted by the PLRA, the provision which now appears at Section 1997e(b) was codified as subsection (d) of the same section. As we discussed above, at that time subsection (a) provided for a limited exhaustion of "administrative remedies" that complied with the Attorney General's minimum standards. Subsection (b) directed the Attorney General to promulgate minimum standards for "system[s] for the resolution of grievances." Subsection (c) directed the Attorney General to develop a procedure for reviewing and certifying "systems for the resolution of grievances," and for withdrawing the certification of any "grievance procedure" which no longer complied with the minimum standards. Finally, subsection (d) — now recodified, with slight changes, to subsection (b) — provided that the failure of a State to adopt or adhere to an "administrative grievance procedure consistent with this section" could not be the basis for an action by the Attorney General. *See* 42 U.S.C. § 1997e(a)-(d) (1994 ed.). It is thus apparent that, as used in Section 1997e, the phrases "administrative remedies," "systems for the resolution of grievances," "grievance procedure," and "administrative grievance procedure" are synonymous with each other: an

"administrative grievance procedure" *is* an "administrative remedy."

More important than these specific shortcomings, however, is that petitioner's entire approach, with its emphasis on words and phrases taken in isolation, is unsound. The Court has recognized that even "the most natural reading of [a] phrase ... when viewed in isolation" may not accurately reflect the meaning of a statute. *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991). Rather, "statutory language must always be read in its proper context. ... 'In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy.'" *Ibid, quoting Crandon v. United States*, 494 U.S. 152, 158 (1990).

Here, the central flaw in petitioner's approach is its failure to consider the meaning of Section 1997e *in the context of its amendment by the PLRA.* Those amendments, on their face, stiffened the statute's exhaustion requirement, eliminated judicial discretion on whether exhaustion should be required, and eliminated judicial inquiry into whether administrative remedies are "plain, speedy and effective" or "fair and effective." "When Congress amends a statute, we presume it intends its amendment to have real and substantial effect," *Stone v. Immigration and Naturalization Service*, 514 U.S. 386, 397 (1995), yet petitioner's reading does just the opposite.

Petitioner attempts to avoid this difficulty by positing that the pre-PLRA statute's requirements that remedies be "plain, speedy and effective" or "fair and effective" encompassed "solely procedural requirements"

and not "substantive remed[ies]." Br. for Petitioner at 36-39. There are two problems with this. First, it is at odds with the ordinary meaning of the phrases; with the understanding the Court expressed in *McCarthy v. Madigan*, 503 U.S. at 150-51, *see supra* at 16-17; and with the understanding of the Attorney General, whose minimum standards for a "plain, speedy and effective system" explicitly addressed substantive remedies. *See supra* at 15-16. Second, if indeed Section 1997e did not address the provision of "substantive remedies" before its amendment by the PLRA, then it surely does not do so now: the point of the PLRA amendments was to broaden the circumstances under which exhaustion would be required, not to narrow them.

Finally, petitioner points to proposed legislation introduced by Representative LoBiondo before the PLRA's enactment, which would have amended Title 18 of the United States Code by adding the following provision:

> No action shall be brought in any court, by a prisoner in the custody of the Federal Bureau of Prisons, concerning any aspect of such prisoner's incarceration until any administrative remedy procedures available are exhausted. ... *The fact that the administrative remedies do not include all the possible procedures and forms of recovery that are available in the civil action does not render such administrative remedies inadequate or excuse the failure to exhaust them.*

H.R. 2468, 104th Cong. § 4048 (emphasis added). Congress did not enact H.R. 2468, and from this petitioner argues that "'[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.'" Br. for Petitioner at 40, *quoting Russello v. United States*, 464 U.S. 16, 23-24 (1983). However, as the Court remarked in an earlier case involving the PLRA, petitioner "overstates the inferences that can be drawn from an ambiguous act of legislative drafting." *Martin v. Hadix*, 527 U.S. 343, 357 (1999).

First, the italicized provision from H.R. 2468 comprises not words of "limitation" but of explanation, which might well have been regarded as superfluous. Second, this provision was not "deleted" from an "earlier version" of the PLRA; it was never *in* the PLRA, but in a separate legislative proposal which took a different tack to the same problem. The PLRA attacked the problem of exhaustion not through a separate provision for federal prisoners, as H.R. 2468 did, but by strengthening the exhaustion requirement of Section 1997e — which originally applied only to state prisoners who filed Section 1983 actions — and extending that strengthened provision to federal prisoners as well.[19] Third, as petitioner recognizes, Representative LoBiondo expressed himself

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[19]Every appellate court to have considered the issue agrees that the PLRA extended Section 1997e's exhaustion requirement to *Bivens* and other actions brought by federal prisoners. *See Nyhuis v. Reno*, 204 F.3d at 68-69; *Alexander v. Hawk*, 159 F.3d at 1324; *Whitley v. Hunt*, 158 F.3d 882, 885 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1265 (10th Cir. 1997).

satisfied that the PLRA would accomplish the objectives of his own proposal. Br. for Petitioner at 40-41, *quoting* 141 Cong. Rec. H14105 (daily ed., Dec. 6, 1995). Fourth, petitioner again takes this "deleted" language in isolation, out of its proper context. It is simply untenable to suppose that Congress, having eliminated all provisions authorizing judicial inquiries into the "effectiveness" of administrative remedies, simultaneously meant to authorize courts to reject exhaustion whenever "administrative remedies do not include all the possible procedures and forms of recovery that are available in [a] civil action."

In the final analysis, then, petitioner's reading of Section 1997e)(a) cannot be squared with either its language or its history. As several courts have pointed out, petitioner's reading would require courts to conduct individualized evaluations of "each cause of action and each type of relief sought in each prisoner's complaint and determine whether the [prison] can grant any adequate relief," thus reintroducing the very inquiry into "effectiveness," and the element of judicial discretion, which the PLRA deleted. *Alexander v. Hawk*, 159 F.3d at 1326; *accord Nyhuis v. Reno*, 204 F.3d at 72-73; *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 893 (S.D.N.Y. 1998).

Thus, even if petitioner's reading of the phrase "such administrative remedies as are available" were "the most natural reading of [the] phrase ... when viewed in isolation," *McCarthy v. Bronson*, 500 U.S. at 139 — which it is not — it should be rejected because it deprives the PLRA amendments of any "real and substantial effect." Moreover, petitioner's reading is at odds with "the design

of the [PLRA] as a whole and ... its object and policy," *ibid*, and to that subject we now turn.

II. The Broad Exhaustion Rule Mandated by Congress Best Serves the Purposes of the PLRA.

Congress enacted the PLRA, in part, to deal with the problem posed by frivolous, meritless and abusive prisoner lawsuits. Lawsuits of this kind accounted for the overwhelming majority of the over 41,000 prisoner civil rights actions filed in 1995, when the PLRA was enacted, and Congress naturally devoted much attention to them. *See, e.g.*, 141 Cong. Rec. S14418 (daily ed., Sept. 27, 1995) (remarks of Sen. Hatch) ("The vast majority of these suits are completely without merit. Indeed, roughly 94.7 percent are dismissed before the pretrial phase, and only a scant 3.1 percent have enough validity to even reach trial");141 Cong. Rec. S7524-25 (May 25, 1995) (remarks of Sen. Dole); *Alexander v. Hawk*, 159 F.3d at 1324 (collecting legislative history). Such lawsuits, however, were not Congress' only concern.

Rather, Congress focused more broadly, as petitioner recognizes, *see* Br. for Petitioner at 42, on the problems presented by prisoner litigation in general.[20] In

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[20]Several provisions demonstrate this. Some, indeed, apply only to successful prisoner litigants, whose claims by definition cannot have been meritless. *See* 42 U.S.C. § 1997e(d) (1994 ed., Supp. IV) (limiting attorneys fees); *id.*, § 1997e(e) (barring some actions for mental or emotional injury); Pub.L. 104-134, §§ 807, 808, 110 Stat. 1321, 1321-75 and 1321-76, *reprinted at* 18 U.S.C. § 3526 note (1994 ed., Supp. IV) (continued...)

addition, Congress wanted to "curtail interference by the Federal courts ... in the orderly administration of our prisons." 141 Cong. Rec. S14316 (daily ed., Sept. 26, 1995) (remarks of Sen. Abraham); 141 Cong. Rec. S14627 (daily ed., Sept. 29, 1995) (remarks of Sen. Hatch) ("time to wrest control of our prisons from the lawyers and the inmates and return [it] to competent administrators").[21] Both of these purposes — reducing the burden of prisoner lawsuits, and reducing judicial oversight of the nation's prisons — are furthered by the broad exhaustion rule which Congress mandated in Section 1997e(a).

Exhaustion, of course, conserves judicial resources by channeling claims to an administrative forum for possible resolution, and this is particularly true for prisoner claims. Many complaints which are utterly without merit as a constitutional matter — for example, that a prison canteen is not accurately filling the orders of its "customers"[22] — might be quite legitimate as an administrative matter, and can be settled at that level. Exhaustion likewise allows an administrative agency to

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[20](...continued)
(damages awarded to prisoner to be used to satisfy restitution orders, crime victims to be notified of award).

[21]*See* 18 U.S.C. § 3626 (1994 ed., Supp. IV) (limiting power of federal courts to issue prospective relief regarding prison conditions).

[22]*See* 141 Cong. Rec. 14627 (daily ed., Sept. 29, 1995) (remarks of Sen. Hatch) ("Inmate's claim: he ordered two jars of chunky peanut butter from the prison canteen and was sent one jar of chunky and one jar of creamy.")

develop the factual background of a claim, to discover and correct its own errors, to apply its discretion and expertise, and to improve the efficiency of its own processes. *See, e.g., McKart v. United States*, 395 U.S. 185, 193-95 (1969); *Alexander v. Hawk*, 159 F.3d at 1327.

Exhaustion serves important purposes even where, as here, a prisoner's lawsuit seeks money damages which are not obtainable from the administrative process. First, it promotes the resolution of prison disputes outside of litigation. As then-Justice Rehnquist remarked in the context of appeals from labor union decisions, "[r]esort to the union appeals procedure provides the union with its first opportunity to focus on the issue.... [It] gives the union an opportunity to satisfy the employee that its decision ... was correct." *Clayton v. Int. Union, United Auto., Aerospace and Agricultural Implement Workers of America*, 451 U.S. 679, 700 (1981) (Rehnquist, J., dissenting). The same is true of prisons and prisoners. In addition, the relief requested in a lawsuit is not always a reliable guide to the relief a prisoner might find acceptable, if only because prison administrators can grant a variety of "in-kind" relief which a court ordinarily cannot. *See, e.g., Rumbles v. Hill*, 182 F.3d 1064, 1066-67 (9th Cir. 1999) (district court held that it was without power to conduct its own investigation or to compel an apology); *Perez v. Wisc. Dept. of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (ability to afford in-kind relief makes it impossible to draw bright line between damages and other relief).

Second, even if no settlement is reached, administrative proceedings can help to clarify, narrow and focus issues for a court, "a function that is especially

beneficial in a field dominated by pro se litigation." *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d at 895. As one court puts it,

> Prisoners' complaints about prison conditions are often filed pro se and generally contain a layman's recitation of complaints about the prison without articulating clearly the legal causes of action in issue and necessitating significant expenditure of judicial resources to review and refine the nature of the legal claims in a prisoner's complaint. ... [An] administrative remedy program ... often helps to focus and clarify the issues for the court.

Alexander v. Hawk, 159 F.3d at 1326 n.11. Petitioner's lengthy, handwritten filings in this case illustrate the difficulties which face courts in dealing with prisoner complaints, and the potential benefits of the administrative process. *See supra* at 7-8 & n.9. Even where a prison grievance procedure is relatively informal and creates no elaborate "record," as will often be the case, it can facilitate the gathering of evidence and the development of a factual background that improves the efficiency of subsequent litigation.

Third, invoking administrative remedies puts prison officials on notice of problems and complaints. Offending practices can be halted, thus freezing the time frame for damages, and obviating future lawsuits on the same issue.

Finally, the across-the-board exhaustion mandated by Congress provides a bright-line rule that benefits courts, prisoners and prisons alike, while at the same time avoiding judicial oversight of prison administrative processes. As the Court said in considering another statute designed to lessen the burden of prisoner litigation, "[this] reading furthers the policy of the Act because its simplicity avoids the litigation that otherwise would inevitably arise in trying to identify the precise contours of petitioner's suggested exception...." *McCarthy v. Bronson*, 500 U.S. at 143. As the Third Circuit said,

> Congress intended to save courts countless hours, educating themselves in every case, as to the vagaries of prison administrative processes, state or federal. ... [The alternative] would involve federal courts in the tedious and intrusive process of evaluating each prisoner's cause of action and the underlying administrative scheme in each prison — something Congress was plainly guarding against when it enacted the PLRA.

Nyhuis v. Reno, 204 F.3d at 74. And as this case illustrates, these inquiries might have to be undertaken not once but several times, as new requests for relief are introduced and existing ones are withdrawn or mooted. *See supra* at 6-8, 10.

Exhaustion of administrative remedies is thus by no means "futile" just because a prisoner does not get, or even cannot get, what he says he wants in his lawsuit; and it was neither "illogical," Br. for Petitioner at 39, nor

against "common sense" *id.* at 12, for Congress to require exhaustion in all cases.

Petitioner's approach, in contrast, would neither lessen the burden of prisoner litigation on the justice system, nor reduce judicial oversight of prison systems, and in fact would frustrate both goals. For one thing, It would enable prisoners to bypass administrative processes at will; as the Seventh Circuit said, "Section 1997e would not be worth much if prisoners could evade it simply by asking for relief that the administrative process is unable to provide." *Perez v. Wisc. Dept. of Corrections*, 182 F.3d at 537. This Court, too, has recognized the dangers in allowing litigants to bypass exhaustion requirements by artfully tailoring the relief they request. *See Heckler v. Ringer*, 466 U.S. 602, 621 (1984) (Medicare claimant cannot bypass administrative remedies by simply bringing declaratory judgment action). And, of course, "every premature filing of an action ... imposes some burden on the judicial system and on [those who] must assume the defense of such actions. Although the burden may be slight in an individual case, the statute governs the processing of a vast number of claims." *McNeil v. United States*, 508 U.S. 106, 112 (1993) (prisoner must exhaust administrative remedies before filing Federal Tort Claims Act action).

Moreover, petitioner's approach would re-involve the courts in case-by-case evaluations — time-consuming for courts and intrusive for prisons — of the sufficiency of prisons' administrative processes "as they attempted to discover whether the local administrative process could have, would have, or might have afforded the inmate relief." *Nyhuis v. Reno*, 204 F.3d at 75. The satellite

litigation that "would inevitably arise," *McCarthy v. Bronson*, 500 U.S. at 143, over this issue would increase, not lessen, the burden of prisoner litigation. It was to avoid precisely this result that Congress, even in the pre-PLRA statute, rejected petitioner's approach of open-ended judicial oversight of the sufficiency of prison administrative remedies. Congress feared that, under this approach, courts "would have to judge a myriad of state procedures without much guidance," and that "this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts." *Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 514 n.18.[23] Petitioner's reading of the exhaustion requirement would thus thwart, rather than further, Congress' purposes.

III. Where Congress Has Specifically Required Exhaustion, the Courts May Not Interpose a "Futility" Exception.

Finally, petitioner argues that "well-established principles of administrative law" establish that administrative remedies need not be exhausted "when the agency to which the litigant must apply for relief 'has no power to decree [the] relief.'" Br. for Petitioner at 24-25, *quoting Reiter v. Cooper*, 507 U.S. 258, 269 (1993). The

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[23]Congress therefore directed the Attorney General to develop minimum standards against which to measure the existence of "effective administrative remedies." *Id.*, at 514 n.16. Of course, the PLRA obviates this problem, since courts are no longer to evaluate whether administrative remedies are "effective" at all.

Court's decisions, however, do not support this broad proposition. Rather, the Court has consistently recognized the primacy of Congress in this area, and has consistently respected the balance struck by Congress as to whether and when exhaustion will be required.

The touchstone of the law of exhaustion is not general "principles of administrative law" but congressional intent. Simply put, "exhaustion of administrative remedies is required where Congress imposes an exhaustion requirement by statute." *Coit v. FSLIC*, 489 U.S. 561, 579 (1989).

> Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts. ...[C]ourts may impose such a requirement even where Congress has not expressly so provided. However, the initial question whether exhaustion is required should be answered by reference to congressional intent.

Patsy v. Bd. of Regents of Fla., 457 U.S. at 501. Exhaustion must thus be applied "with an understanding ... of the particular administrative scheme involved." *McKart v. United States*, 395 U.S. at 193.

Bethesda Hosp. Assn. v. Bowen, 485 U.S. 399 (1988), one of the cases petitioner cites, demonstrates how legislative intent, and not some general "futility" exception, governs the application of exhaustion requirements. In *Bowen*, Medicare providers challenged the validity of regulations governing their reimbursement.

The reimbursement scheme required providers to submit their reimbursement requests first to a fiscal intermediary; the provider could then appeal to the Provider Reimbursement Review Board, with subsequent review in a district court. *Id.*, at 400-01. The Court held that the providers' challenge to the regulations need not be submitted to the fiscal intermediary, not merely because this would be "futile," but because "no statute or regulation expressly mandate[d] it." *Id.*, at 404. The Court noted, however, that such challenges did have to be submitted to the Board, even though "*neither* the fiscal intermediary nor the Board has the authority to declare regulations invalid," because the statute did not treat the two entities alike. *Id.*, at 406-07 (emphasis added).

The other cases cited by petitioner follow the same pattern. *See* Br. for Petitioner at 24-26. In *Reiter v. Cooper, supra* and *Clayton v. Int. Union, supra*, the Court did look to principles of "federal common law," *id.* at 687, crafted by the judiciary, to excuse a litigant from exhaustion on the ground that the administrative agency could not provide relief,[24] but in both of those cases the governing statutes were silent on the issue of exhaustion. *Reiter*, 507 U.S. at 270; *Clayton*, 451 U.S. at 686 n.9. *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984), relied on a statutory grant of authority to district courts to grant "appropriate relief," to reach the same result; *accord Honig v. Doe*, 484 U.S.

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[24]*See Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 518 (White, J., concurring in part) ("exhaustion is a rule of judicial administration ... and unless Congress directs otherwise, rightfully subject to crafting by judges")(internal quotation marks and citation omitted).

305, 327 (1988) (citing legislative history). And *McNeese v. Board of Education*, 373 U.S. 668 (1963), held that requiring exhaustion would be contrary to the statutory scheme — in that case, Section 1983 — under any circumstances. *Accord Patsy v. Bd. of Regents of Fla., supra.* Exhaustion in these cases was thus excused, not under some overarching "principle of administrative law," but by reference to the terms of the particular statutes in question.

By the same token, where a statute does require that administrative remedies be exhausted, the courts "are not free to rewrite the statutory text" to excuse exhaustion, *McNeil v. United States*, 508 U.S. at 11; and exhaustion "may not be dispensed with merely by a judicial conclusion of futility." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975).[25] In such cases, remedies must be exhausted even where the administrative agency cannot

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[25]In rare cases with exceptional circumstances, the Court has excused the failure to exhaust even in the face of a clear statutory requirement. *Mathews v. Eldridge*, 424 U.S. 319 (1975), involved a challenge to agency procedures that was collateral to the applicant's claim for benefits, and a claim of irreparable injury from a wrongful denial. *Id.*, at 331-32. In *Bowen v. City of New York*, 476 U.S. 467 (1986), the government denied benefits on the basis of a secret, illegal policy which claimants could not challenge since they were not aware it existed, and again, the case involved a claim of irreparable injury. *Id.*, at 480-84. The Court has emphasized the narrowness of these holdings, *id.*, at 485 ("unique circumstances"); *Heckler v. Ringer*, 466 U.S. at 618 ("special cases"), and of course they have nothing in common with the case before the Court.

grant relief. Thus, in *Salfi*, the Court held that the Social Security Act required claimants to present their claims first to the Secretary of Health, Education and Welfare, even though they were challenging the constitutionality of statutory provisions which the Secretary had no power to alter; claimants who had not done so were precluded from seeking judicial relief.[26] 422 U.S. at 762-64. In *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 120 S.Ct. 1084 (2000), the Court reached the same result in a case involving the Medicare statutes:

> The Council's members remain free, however, *after following the special review route that the statutes prescribe*, to contest in court the lawfulness of any regulation or statute upon which the agency determination depends. The fact *that the agency might not provide a hearing for that particular contention, or may lack the power to provide one ... is beside the point....*

529 U.S. at —, 120 S.Ct. at 1099 (citations omitted, emphases added). *See also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) ("the contention ... that the administrative body lacked power over the subject matter" does not excuse a failure to exhaust).

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[26]Other claimants, who had presented their claim to the agency but had not pursued all administrative appeals, were excused because the *Secretary* had waived further exhaustion, a decision which the Court held was within his statutory powers. 422 U.S. at 765-67.

Many of the statutes involved in the above cases cast their exhaustion requirements in terms of a limitation on the subject-matter jurisdiction of the federal courts. *E.g., Salfi*, 422 U.S. at 763-64. As several courts have noted, Section 1997e(a) is not a jurisdictional limitation, *Nyhuis v. Reno*, 204 F.3d at 69 n.4 (collecting cases), but this makes no difference to the analysis. The power to prescribe the procedural requirements under which claims may be heard in the federal courts is vested in Congress, *Patsy v. Bd. of Regents of Fla.*, 457 U.S. at 501, and "a ... court may not disregard these requirements at its discretion" whether or not they are "jurisdictional in the strict sense of the term." *Hallstrom v. Tillahook County*, 493 U.S. 20, 31 (1989) (failure to comply with 60-day notice provision for suit under Resource Conservation and Recovery Act required dismissal).

As we demonstrated in the preceding sections of this brief, the language, history, structure and purposes of Section 1997e and the PLRA all compel the conclusion that Congress intended to impose a broad exhaustion requirement on prisoners. As amended by the PLRA, Section 1997e's simple command — "[n]o action shall be brought ... until such administrative remedies as are available are exhausted" — is similar to the language of other laws which the Court has described as "sweeping and direct,"[27] *Weinberger v. Salfi*, 422 U.S. at 757; "could

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[27]"No action shall be brought ... under [28 U.S.C. § 1331] to recover on any claim arising under [Title II of the Social Security Act." 42 U.S.C. § 405(h), *quoted in Weinberger v. Salfi*, 422 U.S. at 756.

not be clearer,"[28] *Hallstrom v. Tillahook County*, 493 U.S. at 26; and "unambiguous."[29] *McNeil v. United States*, 508 U.S. at 111. In such cases, the courts "are not at liberty to create an exception where Congress has declined to do so." *Hallstrom*, 493 U.S. at 27.

The exhaustion requirement in Section 1997e(a) represents a policy judgment by Congress to strike a new balance between keeping open the federal courts for the vindication of prisoners' federal rights, and "avoiding burdening the federal courts with excessive numbers of [prisoner] suits." *Hallstrom*, 493 U.S. at 29. As the Court has pointed out in this very context,

> the relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable.

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[28]"No action may be commenced ... prior to sixty days after the plaintiff has given notice." 42 U.S.C. § 6972(b)(1), *quoted in Hallstrom v. Tillahook County*, 493 U.S. at 25.

[29]"An action shall not be instituted ... unless the claimant shall have first presented the claim to the appropriate Federal agency," *quoted in McNeil v. United States*, 508 U.S. at 109 n.4.

Patsy v. Bd. of Regents of Fla., 457 U.S. at 513 (discussing pre-PLRA version of § 1997e(a)). In fact, the Court recently refused to sanction special judicially-created rules for prisoner cases, precisely because Congress had already acted in the PLRA. *Crawford-El v. Britton*, 523 U.S. 574, 596-97 (1998).

As the Court pointed out in *Crawford-El*, "the PLRA is already having its intended effect." *Id.*, at 597. Prisoner civil rights suits dropped from 41,215 in fiscal year 1996 — the year the PLRA was enacted — to 28, 635 the next year, a drop of 31 percent. *Id.*, at 597 n.18, *citing* Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1997 Report of the Director 131-132 (Table C-2A). That decline has continued, although at a slower rate, to 26,462 cases in fiscal 1998 and 25,694 cases in fiscal 1999. Administrative Office of the United States Courts, Judicial Business of the United States Courts: 1999 Report of the Director 140 (Table C-2A).

Petitioner is simply dissatisfied with the balance struck by Congress in the PLRA, and invites the courts to strike a new balance, substituting case-by-case judicial determinations of "futility" for the PLRA's broad requirement of exhaustion. But "'in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.'" *Hallstrom v. Tillahook County*, 493 U.S. at 31, *quoting Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). If changes are to be made in the balance struck by the PLRA, those changes should come from Congress.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals.

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APPENDIX

UNITED STATES CODE, TITLE 42 (1994 ed., Supp IV)

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who

is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under

section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) Hearings

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable,

the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) Waiver of reply

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) Definition

As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

UNITED STATES CODE, TITLE 42 (1994 ed.)

§ 1997e. Exhaustion of remedies

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

(b) Minimum standards for development and implementation of system for resolution of grievances of confined adults; consultation, promulgation, submission, etc., by Attorney General of standards

(1) No later than one hundred eighty days after May 23, 1980, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and

implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of Title 5. Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide--

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c) Procedure for review and certification of systems for resolution of grievances of confined adults for determination of compliance with minimum standards; suspension or withdrawal of certification for noncompliance; development, etc., by Attorney General

(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b) of this section or are otherwise fair and effective.

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b) of this section or is no longer fair and effective.

(d) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 1997a or 1997c of this title.